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Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,
vs.
COALITION FOR CLEAN AIR, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did enactment of the 1990 Amendments to the Clean Air Act, 42 U.S.C. §7401 *et seq.*, continue EPA's preexisting obligation to complete federal implementation plans for the South Coast Air Basin to supplement pollution control efforts of state and local governments, given that more than twenty years of state and local air quality planning efforts have led to the conclusion that attainment of the National Ambient Air Quality Standards can only be achieved with the assistance of federal measures?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent South Coast Air Quality Management District ("SCAQMD") urges that the Environmental Protection Agency's ("EPA") Petition for Writ of Certiorari ("Petition") be denied. The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin.

STATEMENT OF THE CASE

The SCAQMD incorporates the statement of facts and historical background set forth by the Court of Appeals, Petition at 2a-8a, and the Statement of the Case presented in the Brief in Opposition to EPA's Petition filed

by Respondents Coalition for Clean Air and Sierra Club ("Coalition Brief"). Coalition Brief at 2-8. The following statement clarifies key points.

The South Coast Air Quality Management District ("SCAQMD") intervened in this action in 1988 in order to assure that any FIPs promulgated by EPA would be supportive of the District's efforts to achieve clean air. Under California law, the SCAQMD is the "sole and exclusive agency within the South Coast Air Basin with the responsibility for comprehensive air pollution control," and has "the duty to represent the citizens of the basin in influencing the decisions of other public . . . agencies . . . ." whose actions might affect air quality. Calif. Health & Saf. Code §40412. The SCAQMD is responsible for adopting a plan to achieve and maintain the national ambient air quality standards ("NAAQS") in the South Coast Air Basin. Calif. Health & Saf. Code §40460(a). The SCAQMD's plan is to form a portion of the State Implementation Plan ("SIP") required by the federal Clean Air Act. Calif. Health & Saf. Code §40469.

EPA's obligation to prepare FIPs for the South Coast Air Basin arose from its disapproval, pursuant to court order in *Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987), of the 1982 state implementation plan for the South Coast Air Basin. Plaintiffs Coalition for Clean Air and Sierra Club thereafter filed this action which resulted in the settlement agreement and March 28, 1989 order requiring EPA to adopt FIPs for the South Coast Air Basin. EPA proposed ozone and CO FIPs for the South Coast in 1990. Soon after the 1990 Amendments to the Clean Air Act, 42 U.S.C. §7401 *et seq.* (Supp. II, 1990) were signed, EPA moved to vacate the order and settlement agreement requiring promulgation of the FIPs.

The SCAQMD opposed EPA's motion because adoption of federal emission control measures such as those which could be included in a FIP will be necessary in order for the South Coast Air Basin to attain the NAAQS for ozone. Significant quantities of volatile organic compounds and oxides of nitrogen — which react in the atmosphere to form ozone — are emitted by sources which are not subject to the regulatory jurisdiction of state or local agencies. Such sources, which include aircraft, new locomotives and certain nonroad vehicles, are subject to EPA regulatory jurisdiction. Without federal emission control requirements applicable to such sources, the South Coast Air Basin cannot attain the NAAQS for ozone even if all other feasible control measures are implemented. Appendix attached hereto at A1-A11. (Declaration of Barry Wallerstein, Excerpts of Record at 64-76, *Coalition for Clean Air, et al. v. EPA*, 971 F.2d 219 (9th Cir. 1991) (Nos. 91-55383, 91-55386, 91-55634)).

The need for FIPs in the South Coast is a function of the severe air pollution problem facing this area. The South Coast Air Basin includes Orange County and the nondesert portions of Los Angeles, Riverside and San Bernardino Counties — an area of 10,000 square miles with a population of over 12 million people. Because of adverse meteorology, topography and high population levels, the South Coast Air Basin has by far the worst ozone and nitrogen dioxide levels in the United States, and among the worst particulate matter and carbon monoxide ("CO") levels of any urbanized area in the country. The severity and frequency of exceedances of the NAAQS and the size of the exposed population make air quality in the South Coast Air Basin one of the nation's most serious environmental and public health problems. 55 Fed.Reg. 36464 (1990).

Due to the severity of air pollution in the South Coast, stringent control measures applicable to virtually every emission source will be necessary to attain the NAAQS. This is demonstrated by the region's Air Quality Management Plan ("AQMP"). On March 17, 1989, the District adopted a revision to the AQMP for the South Coast Air Basin which, after approval by the California Air Resources Board ("ARB"), was submitted to EPA on August 18, 1989 as a proposed revision to California's SIP. The AQMP projects attainment of the CO standard in 2000 and the ozone standard in 2010. The AQMP is a highly ambitious program of unprecedented scope which includes detailed descriptions and adoption schedules for over 140 control measures that are classified into three tiers. Tier I includes regulations that the SCAQMD can adopt and begin to implement in the near term using technology that, for the most part, is available currently. Under these regulations, the SCAQMD would stringently control emissions created by industry and commerce. The Southern California Association of Governments would coordinate a far-reaching transportation and land-use management program and the ARB would require further reductions in emissions from consumer products and mobile sources. In addition, as discussed below, the AQMP proposes that the federal government control emissions from certain sources subject to its exclusive jurisdiction.

The AQMP would accomplish the remaining emission reductions, roughly one-half of the total, through regulations designed to create incentives for development of new emission control technologies. "Tier II" measures scheduled for adoption by 1998 would force significant advances in technology, such as significantly reformulated solvents and coatings. Tier III requirements, which would be fully implemented by 2010, rely upon major

technological breakthroughs to eliminate nearly *all* emissions from solvents, coatings, and motor vehicles.

The AQMP includes every conceivable control measure which the District staff determined could feasibly be implemented given today's technology and potential technological breakthroughs by the year 2007. EPA has acknowledged that the SCAQMD is the largest, best funded, and most sophisticated agency of its kind. 55 Fed.Reg. 36460 (1990). Despite inclusion of all feasible measures, the AQMP cannot achieve attainment of the NAAQS for ozone unless control measures applicable to sources under exclusive federal jurisdiction are implemented as proposed in the plan. Appendix at A6-A7.

While the SCAQMD opposed EPA's effort to vacate the FIP requirement, the District did not oppose EPA's alternative request to the District Court in this action to extend the deadline for promulgation of the subject FIPs. We believe that EPA will need additional time to determine the specific form of FIPs required by the 1990 Amendments, to evaluate the latest air quality and other relevant data, and to propose efficient and effective FIPs. We believe that the FIPs proposed by EPA for the South Coast in 1990 can and should be improved in numerous respects.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Summary of Argument

EPA's Petition for Writ of Certiorari should be denied for the following reasons:

1. EPA concedes that the issue presented herein, *i.e.*, whether or not EPA's preexisting duty to promulgate FIPs in California is retained under the 1990 Amendments, will not recur. Petition at 26.

2. EPA also concedes that the issue presented herein is limited to three pending cases, all of which are in the Ninth Circuit. *Id.* There is no conflict among decisions of the circuit courts regarding this issue.

3. EPA's position that this case presents an important question warranting Supreme Court review consists entirely of two policy arguments regarding the practical effects of FIPs on state air quality planning and on sources of pollution. These policy arguments are not meritorious for two reasons: First, they were presented to Congress prior to enactment of the 1990 Amendments as support for EPA's effort to delete language ultimately enacted as part of Section 110(c), an effort which was *rejected* by Congress, and, second, they are directly controverted by EPA's own actions in proposing FIPs for the South Coast in 1990.

EPA's first policy argument is that the Ninth Circuit decision has precluded the federal agency from giving the state and local authorities the opportunity to make the first attempt to assemble the mix of pollution controls they believe are appropriate to achieve the emission reductions necessary — an opportunity they otherwise would have had under the 1990 Amendments. Petition

at 11. This argument is not meritorious because the state has already adopted a plan which has been under development for over a decade and which demonstrates the need for certain federal control measures to supplement state and local requirements. Moreover, as is discussed below, EPA's 1990 FIP proposals demonstrate that FIPs can be carefully tailored to preserve the state's primary planning role and initial opportunity to determine the appropriate mix of air pollution controls.

The 1990 FIPs proposed to accomplish this through two means: First, the FIP proposals were tied to a proposed action by EPA to approve portions of the state implementation plan ("SIP") previously submitted for the South Coast. Since, under the 1990 Amendments, a FIP is used to "fill the gaps" in a deficient state plan, §302(y), 42 U.S.C. §7602(y) (Supp. II, 1990), EPA was able to reduce the scope of the FIPs by approving portions of the state plan. Second, the measures which would be most difficult and costly for emission sources to implement were proposed in the FIPs solely as "backstop" measures, *i.e.*, measures to be implemented only if state and local governments fail to achieve emission reductions adequate to maintain reasonable progress towards attaining the ambient air quality standards. None of the "extreme" measures which EPA claims may have to be included in a FIP (Petition at 24) were proposed to be implemented absent such a failure by the state to exercise its initial opportunity to determine and implement emission controls adequate to attain clean air standards by the same deadlines stated in the 1990 Amendments. 55 Fed.Reg. 36362 (1990).

EPA's second policy argument in support of its Petition is that FIPs are inefficient and costly compared to implementation plans prepared by state and local governments. This argument is incorrect because many

significant emission sources are beyond the scope of state and local regulatory jurisdiction. Regulation of such sources, which include aircraft, new locomotives and other nonroad vehicles, will be essential for the South Coast Air Basin to attain air quality standards. Appendix at A5-A8. The inability of state and local governments to adequately regulate these sources is a major "gap" in the SIP for the South Coast which can be filled by federal measures adopted as part of a FIP. Absent such federal regulations, state and local authorities will be required to impose severe and probably impossible control burdens on sources subject to state and local jurisdiction. FIPs could spread these regulatory burdens across a wider class of sources and thereby minimize economic impacts.

Finally, EPA's position conflicts with congressional intent to build upon past air pollution control efforts, rather than commencing the air quality planning and control process anew, and conflicts with the general savings clause of the 1990 Amendments. §193, 42 U.S.C. §7515 (Supp. II, 1990). The legislative history for the savings clause states that EPA is obligated to "complete ongoing FIP processes" for the purposes of "ensuring that the standards are met by the statutory deadlines" and that "EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards . . . ." 136 Cong.Rec. S.16970 (Daily Ed. Oct. 27, 1990).

B. Argument

1. Introduction

The SCAQMD supports the arguments regarding the proper interpretation of Section 110(c) of the Clean Air Act, 42 U.S.C. §7410c (Supp. II, 1990), stated by Respondents Coalition for Clean Air and Sierra Club in their Brief in Opposition to EPA's Petition. As is described in the Coalition Brief, Section 110(c) was not materially altered by the 1990 Amendments and, therefore, preexisting FIP obligations were not vitiated. Moreover, EPA's contemporaneous interpretation of Section 110(c) and representation to Congress in a letter from EPA Administrator William Reilly to House of Representatives Speaker Foley prior to passage of the 1990 Amendments should be accorded greater weight than the contrary interpretation subsequently stated by EPA during the pendency of this litigation. See Coalition Brief at 4-5.

The above-described arguments in the Coalition Brief will not be repeated here. We will, instead, explain in this brief why EPA's policy arguments regarding the practical effects of FIPs are unfounded. In addition, we will explain why the Section 193 Savings Clause, 42 U.S.C. §7515 (Supp. II, 1990), provides an alternative ground for affirming the decision of the Ninth Circuit. The effect of the Savings Clause was fully briefed by all parties below but, because the Ninth Circuit held that Section 110(c) imposes a current obligation to promulgate FIPs for the South Coast, it did not reach the Savings Clause question.

2. FIPs Need Not Interfere with the Primary Role of State and Local Authorities in Air Quality Planning

EPA argues that the Ninth Circuit decision makes the federal agency "initially and primarily responsible for developing air pollution control strategies" and has precluded EPA from "giving the state and local authorities their rightful opportunity to make the first attempt to assemble the mix of air pollution controls they believe are appropriate to achieve the huge emission reductions necessary — an opportunity they would otherwise have under the 1990 Amendments." Petition at 11. EPA, however, ignores the fact that the SCAQMD has already made the first attempt to develop an appropriate mix of air pollution controls. In fact, we have been attempting to do so for over a decade. What our attempts have shown us is that certain federal measures are needed in addition to all of the state and local measures we can muster.

EPA also ignores the fact that the Clean Air Act clearly allows FIPs to be limited in scope to what is necessary to support state efforts. The Amendments define a FIP as a plan or portion thereof promulgated by the Administrator to "fill all or a portion of a gap" or otherwise correct an inadequacy in a state implementation plan. Section 302(y), 42 U.S.C. §7602(y) (Supp. II, 1990). A FIP must include sufficient enforceable emission limitations or other control measures to, in conjunction with state and local measures, provide for attainment of the relevant national ambient air quality standard. *Id., see also*, Section 110(c) of 1977 Act, 42 U.S.C. §7410(c) (requiring promulgation of an implementation plan "or portion thereof" if state fails to submit an adequate plan).

EPA's 1990 FIP proposals demonstrate how these provisions can be used to support rather than supplant state and local efforts. As EPA stated in its 1990 FIP proposals:

> EPA strongly supports State and local initiatives . . . . Wherever legally permissible, EPA's own proposal relies, and builds upon, and reinforces these initiatives. In this way, we hope to minimize federal intrusion, avoid conflict with and duplication of local efforts, and encourage speedy implementation of the measures State and local authorities wish to adopt . . . . EPA has attempted to design its FIP so as to lend maximum support to the continued development of the State plan, and to allow it eventually to supplant the federal plan in the manner intended by the framers of the Clean Air Act. 55 Fed.Reg. 36460-61 (1990).

Consistent with its duty to fill the gaps in the state's plan, EPA proposed as part of its 1990 FIP notice to take action to approve, disapprove and defer action on provisions of the state implementation plan submitted by California for the South Coast Air Basin. 55 Fed.Reg. 36458 (1990).[1] By approving as much of the state plan as possible, EPA minimized the scope of the required FIPs.

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[1] The proposed actions were based on EPA's interpretation of the types of state measures it could approve under requirements of the 1977 version of the Clean Air Act. EPA proposed to deny full approval and emission reduction credit for portions of the SIP primarily because such provisions were not yet in the form of adopted regulations or firm commitments, or relied on technologies to be developed in the future. 55 Fed.Reg. 36469-71 (1990).

The 1990 notice then proposed FIP control requirements which were structured to preserve the primary role of state and local authorities in air quality planning. To do this, the proposed FIPs consisted of two parts: The first was a set of "core measures" which, as EPA said, "are expected to be technically feasible, cost-effective, legally enforceable, and able to be implemented expeditiously." 55 Fed.Reg. 36509 (1990). These measures consisted of reformulated gasoline requirements, standards for light-duty cars and trucks, and controls on marine vessel tanks. The FIPs then proposed two alternative approaches for achieving the more difficult emissions reductions to occur after 1995. Both approaches would serve to "backstop" the SIP. In the first approach, the "regulatory FIP," EPA would immediately put into place regulations requiring future emission reductions. These regulations would be withdrawn prior to implementation if the state and local authorities implemented measures which would achieve progress adequate to attain the ozone and CO standards by the years 2010 and 2000, respectively (the same deadlines established in the 1990 Amendments). Under the second approach, the "committal FIP," EPA would offer enforceable commitments to develop rules in the future in accordance with a set schedule. Because EPA would have additional time to develop these regulations, they could be tailored to available technology in order to minimize economic impacts. The committal FIP, like the regulatory FIP, was designed as a backstop to state and local measures and would be rescinded to the extent that the state achieved adequate progress towards attainment. 55 Fed.Reg. 36458-36576 (1990).[2] By proposing control

[2] EPA adopted a schedule of reasonable further progress (RFP) which amounts to an annual rate of reduction of 4% per year for (continued)

measures in the form of backstops, EPA's FIP proposal assured that state and local authorities would have the initial opportunity to determine the types of control requirements which would be imposed, and would retain the flexibility to update the air quality plans based on the latest data and planning.

Under the 1990 Amendments, EPA has greater latitude to defer to state and local decisionmaking than under the prior Act because the Amendments contain provisions which will enable EPA to approve a greater portion of the SIP for South Coast, thereby further diminishing the scope of the FIPs EPA is obligated to promulgate. For example, the 1990 Amendments, for the first time, authorize EPA to approve SIP provisions "which anticipate development of new control techniques or improvement of existing control technologies and an attainment demonstration based on such provisions." Section 182(e)(5), 42 U.S.C. §7511a(e)(5) (Supp. II, 1990).[3] The scope of the FIPs which EPA is

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(fn. continued)
VOC and NO_x and 4.5% per year for CO (based on year 2000 attainment date). EPA proposed to monitor the emission reductions and, if the tracking demonstrated that the required emissions reductions would be achieved without backstops, the backstops would be rescinded. These rates of reduction are similar to those proposed in the SIP prepared by the SCAQMD. 55 Fed.Reg. 36537 (1990).

[3] Additionally, EPA is now authorized to approve a plan revision based on a commitment to adopt specific enforceable measures by a date certain, not later than one year after the date of approval. §110(k)(4), 42 U.S.C. §7410(k)(4). In its notice, EPA recognized that "if the Clean Air Act is amended before final rulemaking and includes new requirements that alter the criteria for control measure approval, EPA's proposed actions, including the timetable for submitting fully enforceable measures, will be revised to be consistent with the new statutory provisions." 55 Fed.Reg. 36470 (1990).

obligated to promulgate would therefore be reduced as EPA approves, and thereby defers to, the products of state and local planning efforts.

3. FIPs Can Include Cost-Effective Control Measures which are Necessary for Attainment but which State and Local Governments Lack Authority to Implement, Thereby Spreading Regulatory Burdens and Reducing Economic Impacts

EPA argues that the only type of regulatory plan that it has the means to promulgate and implement would necessarily consist of a limited number of severe measures that would indiscriminately force huge cutbacks in emissions from most mobile, stationary, and area sources. Petition at 12. EPA argues that such extreme measures would include gas rationing, no-drive days, limits on vehicle registration, bans on high-emitting vehicles, and huge cutbacks in solvent use. *Id.* at 24. Such measures, EPA argues, would inflict far more economic and social dislocation on California than would a SIP. *Id.* at 23. These arguments are incorrect as demonstrated by EPA's own 1990 FIP proposals.

The proposed 1990 FIPs had to achieve the same goal that exists today under the 1990 Amendments — attainment of the NAAQS — but they did not contain any control measures mandating gasoline rationing, limits on vehicle registration or bans on high-emitting vehicles.[4] No-drive days were merely one alternative proposal in

[4] EPA merely requested comments on these general topics. 55 Fed.Reg. 36532 (1990).

the CO FIP.[5] With regard to cutbacks in solvent use, the Petition does not point out that the proposed *SIP* also contains extremely stringent control measures, such as a virtual 100% elimination of volatile organic compounds (the components of solvents, coatings and other chemicals which react to form ozone). Thus, part, if not all, of the "economic dislocation" resulting from the solvent measures which EPA suggests would occur under a FIP is simply a function of the enormous emission reductions necessary to attain and is not a function of which agency issues the control requirements.

In any case, under EPA's 1990 FIP proposal, no severe measures such as those described above would be implemented by EPA in the first instance. Except for the relatively easily implemented "core" measures, all measures in the 1990 FIPs are "backstops" to be implemented only if the state and local authorities fail to implement control measures achieving emission reductions necessary to attain. If such failure occurred, implementation of the federal measures would be triggered only to the extent necessary to restore adequate progress towards attainment. 55 Fed.Reg. 36462 (1990). Thus, contrary to the Petition, the FIP can, and EPA's 1990 proposal did, give state and local authorities the opportunity to implement the most cost-effective measures possible and thereby avoid implementation of federal measures.

Moreover, and perhaps most importantly, federal control measures will be required in the South Coast

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[5] The CO FIP may not be necessary *at all*, even if the previously-submitted SIP is not fully approvable, because the SCAQMD has prepared an updated CO attainment plan as required by Section 187(a)(7) of the 1990 Amendments. 42 U.S.C. §7512a(a)(7) (Supp. II, 1990) (requiring state to, by November 15, 1992, submit a plan to attain the CO NAAQS).

District if this area is to ever attain the ambient air quality standard for ozone. The SIP for the South Coast District includes every measure which state and local authorities determined could feasibly be implemented. This includes measures that would require application of known technologies as well as substantial reliance on measures which will only be implementable in the future if substantial new technologies are developed, *e.g.*, electric vehicles. Yet despite these ambitious plans, the SIP barely demonstrates attainment with the national ambient air quality standard for ozone. Appendix at A7. Many of the control measures relied upon in the proposed SIP are applicable to sources which are subject to exclusive federal jurisdiction. These sources include new construction and farm equipment with engines less than 175 horsepower,[6] aircraft,[7] and new locomotives.[8] These sources emit significant quantities of air pollutants (55 Fed.Reg. 36523, 29, 31-32 (1990)) but are relatively uncontrolled compared to sources subject to state and local authority. Without emission limitations applicable to these sources, the South Coast District cannot attain the ambient air quality standard for ozone.[9] This is known with certainty now; there is no

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[6] State and local regulation is preempted by the 1990 Amendments. §209(e)(1), 42 U.S.C. §7543(e)(1) (Supp. II, 1990).

[7] State and local regulation is preempted by §233 of the Clean Air Act, 42 U.S.C. §7573.

[8] State and local regulation of new locomotives is preempted by Section 209(e)(1) of the Clean Air Act, 42 U.S.C. §7543(e)(1) (Supp. II, 1990).

[9] Petition at 40a. EPA itself has apparently concluded that at least some of these sources must be controlled in the South Coast Air Basin. EPA has proposed to regulate some of these sources in its proposed FIP for the South Coast Air Basin. 55 Fed.Reg. 36533, 36570 (1990) (construction equipment and other off-highway mobile

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need to await another round of SIP submittals to determine whether or not these sources must be controlled.

Absent federal controls applicable to sources subject to exclusive federal jurisdiction, state and local authorities will be required to impose severe, and in all likelihood impossible, control requirements applicable to sources within state and local regulatory jurisdiction. (As discussed previously, the AQMP barely demonstrates attainment of the ozone NAAQS assuming implementation of all feasible measures, including the federal control measures.) Thus, EPA's arguments regarding the inefficiency and cost impacts of FIPs are incorrect. Without federal controls, the burden faced by sources within the South Coast District would be increased, probably to impossible levels.

In short, what is required to effectuate congressional intent that air quality standards be attained as expeditiously as practicable with, as EPA states, "concern for ensuring future economic growth and well-being," Petition at 10, is the "federal-state partnership for the control of air pollution" described by the Ninth Circuit. Petition at 15a. The regulatory authorities of local, state *and* federal governments must be brought to bear in a coordinated fashion in order to achieve the congressional goal of clean air in the South Coast Air Basin. A federal implementation plan which, as Congress mandated, "fills the gaps" in state plans, would achieve this objective.

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sources); 36532 (1990) (limiting growth in emissions from locomotives, ships and aircraft). The District has commented to EPA that the proposed FIP does not propose to adequately regulate these sources.

4. EPA's Position is Contrary to Congress' Intent to Build Upon Past Efforts So As to Achieve Expeditious Attainment, Rather than Commencing the Air Quality Planning Process Anew

EPA's position is contrary to Congress' manifest intent because it would create a potential seven year hiatus in needed federal control efforts. Congress' purpose in adopting the 1990 Amendments certainly was not to make attainment of healthful air a more difficult or lengthy process. Similarly, Congress clearly did not intend to ignore well over a decade of effort under the Clean Air Act by requiring the federal control process to begin anew. Yet, as is set forth below, these are the consequences of the EPA's erroneous interpretation.

Under the 1990 Amendments, the state has until November 15, 1994 to submit a SIP revision demonstrating that attainment of the ozone standard will timely occur. §182(c)(2), 42 U.S.C. §7511a(c)(2) (Supp. II, 1990). EPA has one year to review such a submittal, and two years thereafter to promulgate a FIP, §110(c), (k), 42 U.S.C. §7410(c), (k) (Supp. II, 1990), for a total of seven years from the date of enactment. Under EPA's interpretation, this is the earliest that EPA would be required to adopt a FIP demonstrating attainment of the ozone standard. Yet, as a result of decades of state and local air quality planning pursuant to the Clean Air Act, it is known *today* that certain federal controls will be required and that a seven year delay in their adoption would jeopardize timely attainment. Appendix at

A7-A8.[10]

Contrary to EPA's position, the entire structure of the 1990 Amendments evidences an intent to build on prior efforts without any hiatus in planning or implementation actions. For example, preexisting SIPs remain in effect, §110(n)(1), 42 U.S.C. §7410(n)(1) (Supp. II, 1990), previously-required control requirements are saved, §193, 42 U.S.C. §7515 (Supp. II, 1990), preexisting guidance remains in effect, *Id.*, and existing state implementation plans must be *augmented*, not replaced, by addition of new or enhanced control measures. §110(n)(1), 42 U.S.C. §7410(n)(1), §182, 42 U.S.C. §7511a (Supp. II, 1990). The Amendments also retain the requirement that attainment of the NAAQS occur "as expeditiously as practicable." §181, 42 U.S.C. §7511(a)(1) (Supp. II, 1990).

Moreover, contrary to EPA's argument, Congress did not eliminate the fundamental element of the requirement that triggered EPA's FIP obligation. That element is the requirement that the states have an enforceable plan which contains control measures sufficient to attain the ambient air quality standards. In enacting the 1990 Amendments, Congress recognized state failures to meet this requirement but chose not to eliminate or change it; rather Congress merely specified new deadlines and certain plan elements for achieving that same goal. There is nothing in the SIP or proposed 1990 FIPs which

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[10] Emission controls applicable to many sources, including those subject to exclusive federal jurisdiction, will require significant lead times to develop and implement. In addition, many of the above-described sources have long useful lives so that, to the extent that the common practice of applying emission standards only to new units is followed, the public may not see any air quality benefits due to control of these sources until well into the 21st century. Appendix at A6-A8.

is inconsistent with either the new attainment deadlines or the state's primary role in fulfilling the planning requirements of the 1990 Amendments.[11]

5. The Section 193 Savings Clause Provides an Alternative Ground for Affirming the Decision

Because the majority below found that the language of Section 110(c) continued EPA's FIP obligations, it did not address the effect of Section 193. Petition at 8a. However, the Savings Clause provides an alternative basis for upholding the decision. The General Savings Clause of the 1990 Amendments states as follows:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this Act, as in effect before the date of the enactment of the Clean Air Act Amendments of 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this Act, inconsistent

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[11] State planning procedures and SIP submittal requirements specified in the Act would have to continue to be followed even if a FIP is promulgated. If the state fails to submit one of the many specifically required SIP elements (*e.g.*, clean fuel requirements, enhanced vehicle inspection and maintenance), the FIP process would be triggered for such deficiency as contemplated by Congress. To the extent that the state submits fully approvable measures, they could be substituted for portions of the FIP if they achieve equivalent emission reductions. A similar program preserving the state's primary role in air quality control was proposed by EPA as part of its 1990 FIP proposal for the South Coast Air Basin. Moreover, the attainment deadlines in the 1990 Amendments are the same as the projected dates in both the proposed SIP for the South Coast and EPA's 1990 FIP proposals. 55 Fed.Reg. 36462 (1990).

> with any provision of this Act, or revised by the Administrator. *No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.* §193, 42 U.S.C. §7515 (Supp. II, 1990). (Emphasis added.)

By its terms, the General Savings Clause is directly applicable to the instant settlement agreement and order to promulgate FIPs for the South Coast Air Basin. The FIPs are to be made up of "control requirements" and were "required to be adopted" by an "order" and "settlement agreement" "in effect before the date of enactment of the Clean Air Act Amendments of 1990." Thus, under the General Savings Clause, the FIPs may not be modified after enactment of the 1990 Amendments "in any manner" unless the modification ensures equivalent or greater emission reductions. Here, EPA is not seeking to ensure equivalent or greater emission reductions; rather, it seeks a total and unconditional elimination of the requirement to promulgate FIPs. Congress has expressly prohibited this under Section 193.

EPA attempted to avoid the literal meaning of the General Savings Clause by arguing that the term "control requirement" refers only to a discrete regulation directed at a specific source of pollution, or an order to promulgate a FIP containing a few specific control requirements. EPA argued that since the settlement agreement and order in the instant case required development of plans including many control measures which had not

yet been specifically defined, the General Savings Clause is inapplicable.

The distinction which EPA invents between an order mandating adoption of a control requirement which is specifically defined at the time of the order, and one which is not yet specifically defined at the time of the order, finds no basis in the statute and is contrary to congressional intent evidenced by the broad wording of the savings clause. The FIPs required by the settlement agreement and order in this case must, by definition, be made up of "control measures,"[12] a phrase certainly encompassed within the broad term "control requirements." The expansive language in the General Savings Clause (*e.g.*, specifying that control requirements are preserved whether "required to be adopted by an order, settlement agreement, or plan") also evidences congressional intent to ensure the broad applicability of the General Savings Clause.

Moreover, the distinction between defined and undefined measures which EPA makes is illogical from a policy perspective. The fact that the proposed South Coast Air Basin FIP must contain numerous control measures which were not specifically defined at the time of the settlement agreement and order is a function of the massive air quality problem this area faces, the great number and breadth of control requirements necessary to address the problem, and the failure of EPA to carry out its obligation to timely disapprove the SIP and develop

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[12] The Clean Air Act defines a FIP as:

> a plan . . . which includes enforceable *emission limitations* or other *control measures*, means or techniques . . ., and *provides for attainment* of the relevant national ambient air quality standard. (Emphasis added.) §302(y) at 42 U.S.C. §7602(y) (Supp. II, 1990).

FIPs. It would be anomalous to interpret the General Savings Clause as imposing a lesser control obligation for highly polluted areas such as the South Coast Air Basin than for areas in which far lesser controls are required. Moreover, under EPA's backwards formulation, the agency would be relieved of the FIP obligation primarily because it failed to carry out its duty to disapprove the SIP and develop specific FIP measures in a timely fashion. *See Abramowitz v. EPA*, 832 F.2d 1071 (9th Cir. 1987).

Finally, the legislative history of the General Savings Clause demonstrates congressional intent to preserve EPA's obligation to promulgate FIPs. In the Congressional Record for October 27, 1990, Senator Baucus, Chairman of the Conference Committee for the 1990 Amendments, explained the purpose of the General Savings Clause. As floor manager of the 1990 Amendments and Chairman of the Conference Committee, Senator Baucus' remarks are entitled to substantial weight, *Mills v. United States*, 713 F.2d 1249 (7th Cir. 1983). Senator Baucus stated that under the 1990 Amendments EPA need not promulgate complete FIPs for the South Coast "based on requirements of the old Act." However, according to Senator Baucus, EPA is obligated to "*complete ongoing FIP processes*" *for the purposes of "ensuring that the standards are met by the statutory deadlines.*" In discussing the South Coast FIPs, Senator Baucus stated that "*EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of*

the Act . . . ."[13] Senator Chafee made a similar statement in a colloquy with Senator Wilson.

The interpretation found in the statement of Senator Baucus that EPA need not adopt FIPs based on the old Act, but must complete ongoing FIP processes to assure attainment, is directly supported by language of the 1990

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[13] The full statement reads as follows:

> "The savings clause in the new legislation is intended to ensure that no backsliding occurs from implementation of adopted, currently feasible measures that EPA has approved as part of a SIP in the past, or currently feasible measures that EPA has added to state plans on its own initiative or pursuant to a court order or settlement, including a Federal Implementation Plan. We do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California and preempt the state's and regional air quality planning that is ongoing in Los Angeles area and will otherwise be required under this legislation. If EPA were to promulgate complete new plans *based on requirements of the old Act*, the area subject to those federal plans would be deprived of the opportunity to use the significantly revised and clearly more workable requirements of the new legislation. We agree that this would be unreasonable, particularly since the proposed FIP fails to recognize the critical role that local governments play in reducing transportation-related emissions.
>
> "The savings clause provides EPA with significant discretion with respect to FIPs in California. *EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act but, beyond that, EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines.*" 136 Cong.Rec. S.16970 (Daily Ed. Oct. 27, 1990). (Emphasis added.)

Amendments which provide EPA flexibility to approve greater portions of the SIP, *e.g.*, §182(e)(5), 42 U.S.C. §7511(e)(5) (Supp. II, 1990), and which define a FIP as a device to fill the remaining gaps in the state's attainment demonstration. §302(y), 42 U.S.C. §7602(y) (Supp. II, 1990). The authoritative statements by the Chair of the Conference Committee are *totally incompatible* with EPA's position that it has absolutely no obligation to promulgate any type of FIP in the South Coast Air Basin. If any type of FIP obligation survives, as it does, EPA's position must be rejected.

CONCLUSION

For the foregoing reasons, EPA's Petition for Writ of Certiorari should be denied.

DATED: December 17, 1992.

Respectfully submitted,

PETER M. GREENWALD
Counsel of Record
for Respondent

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT

APPENDIX

The Declaration of Barry Wallerstein as included in the Excerpts of Record at 64-76, *Coalition for Clean Air, et al. v. EPA*, 971 F.2d 219 (9th Cir. 1991) (Nos. 91-55383, 91-55386, 91-55634) reads as follows:

DECLARATION OF BARRY R. WALLERSTEIN

I, Barry R. Wallerstein, affirm and declare that the following statements are true and correct to the best of my knowledge and belief and are based on my personal knowledge or on information contained in the records of the South Coast Air Quality Management District ("SCAQMD") or supplied to me by employees at the SCAQMD.

1. My name is Barry R. Wallerstein, and I am employed by the South Coast Air Quality Management District (SCAQMD) as the Director of Planning.

2. My educational background consists of a Doctorate in Environmental Science and Engineering from the University of California at Los Angeles (1988) and a Bachelor's (1977) and Master's (1980) degree in Biological Science from the University of Southern California.

3. As Director of Planning for the South Coast Air Quality Management District I am responsible for development of the Air Quality Management Plan (AQMP or Plan) to attain federal and state air quality standards and all District analyses related to attainment of federal ambient air quality standards in the South Coast Air Basin. This includes: pollutant emission control strategy development, air quality modeling, economic impact analysis, environmental impact evaluation, energy conservation and demand analysis, and public health assessments. There are currently 75 staff positions within the South Coast Air Quality Management District Planning Division.

4. From August 1988 until January 1989, I was an Environmental Control Administrator for Northrop Corporation. My duties included administration of company-wide efforts to comply with hazardous waste regulations and development of initiatives to promote waste minimization.

5. From July 1984 until August 1988, I was a member of the South Coast Air Quality Management District staff, most recently in the Rule Development Division as the Program Supervisor for coating and solvent rules to implement the AQMP. Prior to that position I served as the Program Supervisor in the Planning Division for development of short and long-term control measures for the 1989 Air Quality Management Plan Revision.

6. From 1982 to July 1984, I was a member of the rule development staff in the Mobile Source Division of the California Air Resources Board (ARB). My activities included development of ARB's portion of the 1982 State Implementation Plan, diesel particulate standards for passenger cars, tailpipe standards for motorcycles, and emission test procedures for heavy-duty vehicles.

7. Prior to 1982, I was employed as a research assistant on a variety of projects related to new energy technologies and the effects of coastal power plants on the marine ecosystem. Several of these projects included evaluation of technologies currently proposed to reduce air pollutant emissions in California.

8. The purpose of the Air Quality Management Plan is to set forth a comprehensive program for the South Coast Air Basin to achieve all federal and state ambient air quality standards. The Plan is intended to serve as the South Coast Air Basin portion of the State Implementation Plan required by the Federal Clean Air Act. In addition, the Plan is designed to comply with all other requirements of the federal and California Clean Air Acts.

9. The South Coast Air Basin, which comprises all of Orange County and the non-desert portions of Los Angeles, Riverside and San Bernardino Counties, has the worst air quality in the nation. Despite having put into place many strict controls, the Basin still fails to meet the federal air quality standards for four of the six criteria pollutants.

10. In 1989, one or more of the federal standards were exceeded on 219 days in the Basin. The federal ozone standard was exceeded on 120 days, over three times as frequently in the Basin as in any other area of the United States. The Basin was the only area in the country to exceed the federal nitrogen dioxide standard. It exceeded the carbon monoxide standard most frequently as well, with two and one-half times as many exceedances as the next worst area of the nation.

11. Attachment 1 shows the maximum pollutant concentrations in 1989 as a percentage of the state and federal standards. Attachment 2 shows the percentage of days, months, or quarters which each pollutant exceeded the standards at the most affected location.

12. The AQMP includes all the potential control measures that could possibly be available by the year 2010 given current technology and possible technological breakthroughs. The identified control measures are categorized into three tiers, based upon their readiness for implementation. Full implementation of all three tiers will reduce ozone precursor emissions by more than 80 percent and carbon monoxide emissions by approximately 60 percent. Such emission reductions are needed to attain federal standards. The difficulty of achieving these reductions is clear when one realizes that significant sources are currently controlled by over 80-90%. The AQMP thus proposes even more stringent controls and controls applicable to every conceivable source, from utility boilers to barbecues.

13. Tier I control measures are defined as those that can be adopted in the next five years with currently available technological applications and management practices. Implementation (and construction) of these measures will occur over the next twenty years. Several of these measures are directed at the control of pollution sources which are solely under federal jurisdiction.

14. Over 120 Tier I control measures are currently identified in the AQMP. They reduce emissions by:

- reduction in the use of pollutant-emitting materials;
- use of the most efficient pollution control devices;
- programs to control fugitive emissions from industrial processes;
- maximizing the efficiency of the transportation infrastructure to provide less polluting forms of transportation;
- maximizing the effectiveness of existing measures through improved administrative practices;
- seeking public and private commitments for the required implementation actions.

15. Tier II requires further advancement or improvement of existing Ozone and PM10 control technologies. Tier II is expected to be implemented in the next ten to fifteen years. In some cases, new technological applications not presently on the market are required, but these could be expected to develop through continuous improvements and refinements to products currently available. Regulatory intervention is employed whenever necessary to expedite commercialization of new products and to mitigate future emission growth. Tier II also includes measures which require additional funding and/or legislative authority. Sources solely under

federal jurisdiction are also targeted as part of the Tier II control strategies.

16. The Tier II measures would reduce emissions by:

- extending current technological applications beyond the levels historically pursued;
- regulatory intervention through technology-forcing standards or emission charges, *e.g.*, by requiring a 50% reduction in solvent emissions from coatings (which already must meet stringent limits);
- developing public and private commitments for the required implementation actions, including additional funding and/or legislative authority as necessary.

17. The Tier III programs are designed to bring about technological breakthroughs to further reduce reactive organic gas emissions to achieve the federal ozone standard. These programs are directed at the sectors where significant emissions still exist after implementation of Tiers I and II.

18. The Tier III programs include:

- Solvents and Coatings in industrial, commercial, and residential applications.
- Remaining petroleum based-fuel emissions in stationary and mobile applications.
- Unlike Tier II, which focuses on further strengthening known emission controls, Tier III calls for efforts to develop new technology to reduce remaining emissions.

19. All three tiers of controls are needed to achieve attainment of the federal ambient air quality standards, including ozone and carbon monoxide. Recently completed analysis indicates, with full implementation of all three tiers, the Basin will achieve the federal carbon

monoxide standard in the year 2000 and the federal ozone standard in the year 2010. These attainment projections include control of emissions sources under federal jurisdiction and without such controls attainment will not be possible.

20. The proposed 1991 AQMP contains several control measures aimed at controlling emissions from sources subject to exclusive federal jurisdiction including aircraft, locomotives, and construction equipment and farm equipment. In addition, the AQMP proposes measures for implementation by the federal government which, because of practical or legal constraints, require federal regulations to fully or effectively control their emissions. Such sources include outer continental shelf operations and marine vessels.

21. The above-described sources subject to federal regulation contribute three percent of total ROG emissions and 11 percent of NO_x emissions in the Basin. The emissions reduction potential associated with these measures is estimated to be 23 tons per day of ROG, 60 tons per day of NO_x, and 32 tons per day of CO in 2010. AQMP control measures for these federally-regulated facilities are listed in Attachment 3. These are extremely significant emission levels, particularly in an area such as the District which must stringently regulate sources as small as personal deodorants in order to attain.

22. In addition, while not currently addressed by an AQMP measure, motor vehicles originating out-of-state must also be characterized as sources under exclusive federal jurisdiction. Currently, these vehicles constitute approximately 20 percent of the in-use vehicle fleet in the South Coast Air Quality Management District, which corresponds to 1.2 million vehicles. Since emission standards for out-of-state vehicles are substantially less stringent than California vehicles, the potential

emissions penalty associated with their operation can be significant. The 1990 Amendments to the Clean Air Act provide that EPA must determine whether or not to impose "Phase II" emission standards applicable to such "49 state" vehicles sold in 2003 and later. If EPA decides to impose these standards, emission reductions in the South Coast Air Basin are estimated to be as high as six tons per day of hydrocarbons, 11 tons per day of NO_x, and 60 tons per day of CO. Such reductions would substantially aid the District's attainment effort and reduce the control burden applicable to sources subject to state and local jurisdiction.

23. Moreover, every conceivable emission reduction that is feasible is included in the AQMP and the AQMP barely attains the federal ozone ambient air quality standard. Even if unforeseen or targeted technological breakthroughs were to occur (beyond the ambitious assumptions in the AQMP), available control measures on federal sources would still be needed to achieve reasonable further progress in the early to intermediate years of Plan implementation, and to attain as expeditiously as practicable or required by the Clean Air Act.

24. If the decision to adopt control measures applicable to these federally-regulated sources is delayed from the adoption schedules set forth in Attachment 3, timely attainment of the ozone ambient air quality standard will be jeopardized. Controls applicable to many of these sources (*e.g.*, aircraft), can take years to develop and many more years to implement. Control requirements for mobile sources generally are only applied to new units. This, and the long useful lives of aircraft, construction equipment, locomotives, *etc.*, would mean that significant emission reductions would not be realized until many years after the effective date of the emission limits. In my opinion, attainment of the federal ozone

ambient air quality standard will be made substantially more difficult if development efforts for control requirements applicable to the above-described sources do not commence soon and adoption of regulations is delayed beyond the dates set forth in Attachment 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of December, 1990, at El Monte, California.

/s/ Barry R. Wallerstein
Barry R. Wallerstein

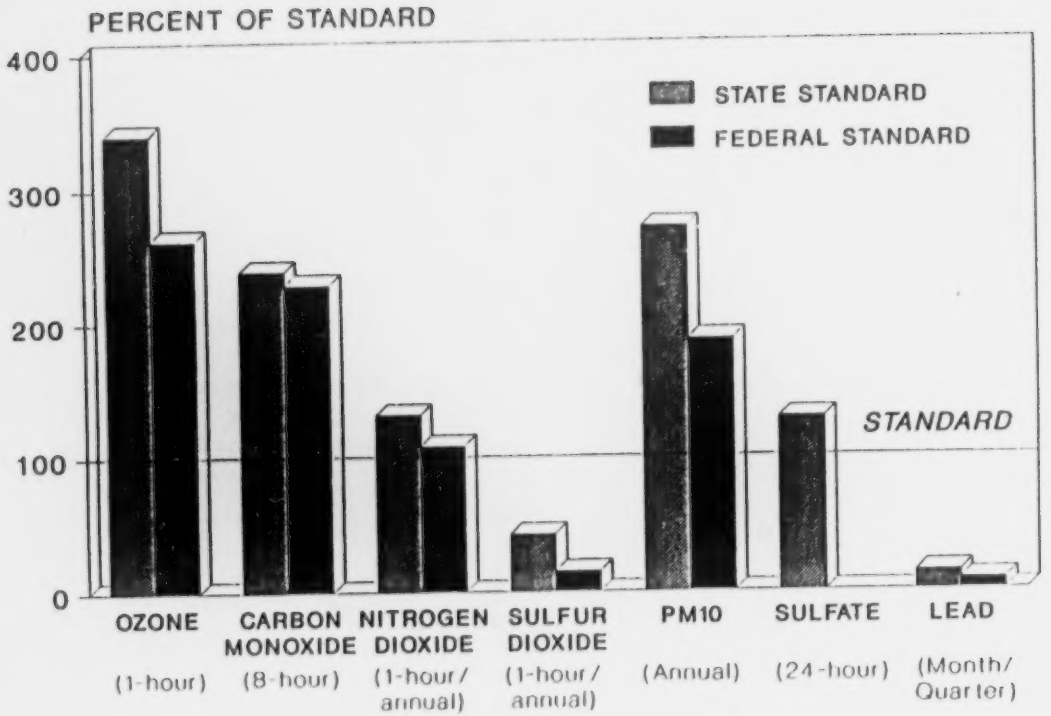
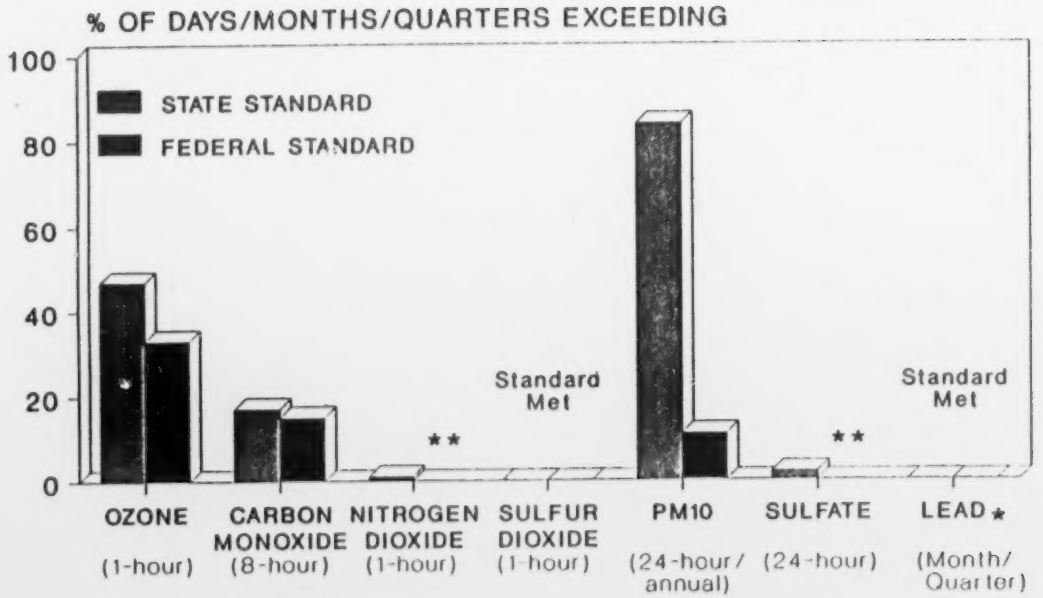


FIGURE 2-2

1989 Maximum Pollutant Concentrations
as Percent of State and Federal Standards



*Percent of months for state standard and percent of quarters for federal standard.
**There is no federal standard for sulfate and no short term federal standard for nitrogen dioxide.

FIGURE 2-3

1989 Percent of Days/Months/Quarters Exceeding
State and Federal Standards at Most Affected Locations

Federal Government - Tier I Control Measures

AQMP No.	Measure Title	Proposed Implementation Date	Proposed Emission Reductions (Tons/day) ROG	NO^x	CO	Proposed Adoption Date
M-I-2	Control of Emissions from Jet Aircraft [ROG, CO, NOx]	1996-2000	3.4	8.1	13.4	1992
M-I-3	Control of Emissions from Marine Vessel Tanks [ROG]	1994-1997	4.8	0	0	1991
M-I-6	Low Emissions from Military Aircraft [ROG, CO, NOx]	2000-2005	3.2	1.5	6.6	1995
M-I-8	Emission Standards for Construction and Farm Equipment [ROG, NOx, CO, PM10] (175 HP and less)	*	2.0	15.6	0	1994
9	Replacement of High Emitting Aircraft [All Pollutants]	2000	3.1	3.3	6.5	1992
14	Railroad Electrification [All Pollutants]	2005	1.1	23.7	3.6	1998
P-B-5	Control of Emissions from OCS Exploration, Development and Production [All Pollutants]		DOI/EPA/		1992	1996

* To be determined at a later date.